CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 765.

GEORGE M. WEST COMPANY, APPELLANT,

vs.

LEA BROS. & COMPANY.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED APRIL 1, 1904.

(17,340.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 755.

GEORGE M. WEST COMPANY, APPELLANT,

vs.

LEA BROS. & COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate of United States circuit court of appeals	1	1
Statement of the case	1	1
Petition	1	1
Copy of deed	2	2
Plea or answer	3	3
Motion to reject plea or answer	3	3
Order of district court, January 10, 1899	4	3
Question certified	6	5
Clerk's certificate	7	5

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 4, 1899.

1 United States Circuit Court of Appeals, Fourth Circuit.

GEORGE M. WEST COMPANY, Appellant,
vs.
LEA BROS. & COMPANY ET ALS., Appellees. } No. 305.

In error to the district court of the United States for the eastern district of Virginia, sitting at Richmond, Virginia.

This is to certify that Lea Bros. & Company *et als.*, appellees, filed their petition in bankruptcy in the district court of the United States for the eastern district of Virginia on December 12, 1898, against the George M. West Company, of the city of Richmond, State of Virginia, alleging that the George M. West Company, their debtor, a corporation created and doing business under the laws of the State of Virginia, filed a general deed of assignment in the clerk's office of the chancery court of the city of Richmond on the 12th day of December, 1898, conveying to Joseph V. Bidgood, trustee, all of its assets, a copy of which deed is herewith filed and asked to be taken and considered as a part of this petition.

Your petitioners aver and charge that the said George M. West Company was engaged principally in printing, publishing and mercantile pursuits and conducted business in the city of Richmond for a period of at least six months prior to the execution of said deed, at which place was its principal office.

Your petitioners aver and charge that the said George M. West Company was at the time of the filing of the said deed of assignment, and is now, justly indebted to them in the amounts set opposite their names, respectively, which said amounts aggregate the sum of more than five hundred dollars: Lea Bros. & Co., $205.00; Blakiston's Sons & Co., $245,00; George B. Baines & Sons, $25.00, and Ginn & Co., $335.00.

2 Your petitioners aver and charge that the indebtedness due to each of them is a debt provable under the United States bankrupt law and are for merchandise furnished by them to the said George M. West Company at its request, and for the payment of which neither of them hold any securities of any kind, nature or description whatsoever.

Your petitioners aver and charge that the said George M. West Company is insolvent, and that by the filing of the said general deed of assignment it has committed an act of bankruptcy, and that the said general deed of assignment is null and void and of no force and effect whatsoever, and is in contravention of the United States bankrupt statutes.

Your petitioners respectfully pray that the said George M. West Company and Joseph V. Bidgood, trustee in said general deed of assignment, be made parties defendant hereto; that the said George M. West Company may be adjudicated a bankrupt; that its assets may be taken into and under the control of this court; and that all such orders may be entered as may be necessary in the case, and

all such other relief granted to your petitioners as the nature of their case may require and to the court may seem meet.

And your petitioners will ever pray, &c.

LEA BROS. & CO.
P. BLAKISTON, SON & CO.
GINN & CO.

(*Copy of Deed.*)

This deed, made this tenth day of December, 1898, between the George M. West Company, a corporation under the laws of Virginia, of the first part, and Joseph V. Bidgood, named as trustee, of the second part.

Witnesseth, that in accordance with resolutions of the stockholders and board of directors of the party of the first part, of this date, and by the authority thereby given to George M. West, president of the said company, and in consideration of the sum of five dollars, in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the said George M. West Company hereby grant and convey to the said Joseph V. Bidgood all of their assets, consisting of open accounts, estimated at about $3,800, and the stock on hand in their store, No. 834 E. Main street, together with the furniture and fixtures in said store to them belonging, it being the intention hereby to convey all of the assets of the company of whatever kind; in trust, nevertheless, to pay the cost of drawing, recording and executing this deed, including a fee of fifty dollars to Henry & Williams for legal services connected therewith, and a commission of ten per cent. on all moneys collected and paid out by the said trustee, and the wages of such agents and attorneys as he may need to aid in the execution of this trust, and next to pay all of the debts of the company, whether due, or to become due, without priority, except such priority as any may have under the laws of Virginia, and the balance, if any, to be paid to the party of the first part, or its assigns, and the said trustee is hereby authorized and directed to take possession at once of the assets hereby conveyed, and, as speedily as possible, collect the debts due the company, and to sell the other assets as he may think best for the interest of the creditors, employing suitable agents therefor.

3 And a list of the assets and of the liabilities will be furnished him, from the books of the company, to enable him to execute the trust hereby imposed on him.

In witness whereof the said company has herewith signed its name, by its president, and affixed its corporate seal, attested by the secretary, the day and year first above mentioned.

[SEAL.] THE GEORGE M. WEST COMPANY,
By GEO. M. WEST, *President.*

Attest: WM. B. ISAACS, *Sec'y.*

The appellant on December 27th, 1898, filed its plea or answer to said petition in bankruptcy, as follows:

EASTERN DISTRICT OF VIRGINIA, *ss:*

And now on this day the said George M. West Company by George M. West, its president, and Joseph V. Bidgood, trustee, appear and deny that the said company was insolvent, as defined in the act of Congress under which this proceeding is had, at the time of the filing of this petition against it by the said creditors, and aver that its property was at a fair valuation then sufficient in amount to pay its debts, and thereupon they pray that this be inquired of by the court, and that the said company be not declared a bankrupt, but this proceeding be dismissed as required by said act.

The appellees then moved the court on December 28th, 1898, as follows:

In the United States District Court for the Eastern District of Virginia.

In the Matter of GEORGE M. WEST COMPANY, Bankrupt.

The petitioners in the involuntary petition in bankruptcy filed herein on the 12th day of December, 1898, come this day, by their attorneys, and move the court to reject the plea or answer filed herein by the said George M. West Company on the 27th day of December, 1898, and adjudicate the said George M. West Company a bankrupt.

4 The court sustained the said motion of appellees, and on January 10, 1899, entered the following order:

In the District Court of the United States for the Eastern District of Virginia.

LEA BROS. & Co., &c.,
vs.
GEO. M. WEST Co., &c.

This day came again the petitioners, by counsel, and the defendant, The Geo. M. West Co., in pursuance of the summons awarded against them on the 12th day of December, 1898, requiring them to show cause why they should not be adjudicated to be involuntary bankrupts, appeared in open court and presented and filed a plea in writing, alleging the solvency of said company, which plea the petitioners, by motion in writing, duly filed, moved the court to reject. And said petitioners also filed a certain other petition in writing, setting out the fact that the law & equity court of the city of Richmond, at the instance of certain creditors secured in the deed of assignment of the said Geo. M. West Company, had taken charge of the administration of the trust, under the deed of assignment, on the day of the recordation of the said assignment; and of the filing

of the petition in bankruptcy, and appointed the trustee named in said deed of assignment its receiver; and upon the answer, in writing, of the said Geo. M. West Company, John L. Williams & Sons John Skelton Williams and Jos. V. Bidgood, this day filed, to said last-named petition, and upon the exceptions filed by the petitioners to the said last-mentioned answers, and upon the several exhibits filed with said several papers, and was argued by counsel.

Upon consideration whereof, the court, being of the opinion that the making of the general deed of assignment was of itself an act of bankruptcy and void at the instance of the creditors, doth reject the said plea alleging solvency, and being of opinion that, in the event of bankruptcy, the administration of the estate of the bankrupt should be in this court, doth adjudge, order and decree that the said deed of assignment be, and the same is hereby, declared null and void, and that the said Geo. M. West Company has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and is hereby declared and adjudged a bankrupt accordingly.

And, thereupon, it is ordered that this cause be referred to W. F. Wickham, of Richmond, Virginia, one of the referees in bankruptcy of this court, to take such other proceedings therein as are required by said law; and further, that the said Geo. M. West Company, on or before the 20th day of January, 1899, at twelve o'clock noon, file with said referee a schedule of their li-bilities and an inventory of their assets at the time of the filing of said petition, and further, that the said Geo. M. West Company attend before said referee on said day, and henceforth, as said referee may direct, to submit to such orders as may be made by said referee, or by this court, relating to his said bankruptcy.

5 And the court doth overrule the exceptions to the said answers filed to the said last-mentioned petition, and doth further adjudge, order and decree that the Geo. M. West Company, Jos. V. Bidgood, in his individual capacity and as trustee and receiver, as set forth in this proceeding, be enjoined and restrained, until the further order of this court from disposing of, or parting with, the proceeds arising from the sale of the stock and assets of said Geo. M. West Company, now in hand or which may hereafter be received, and that John L. Williams, John Skelton Williams, R. Lancaster Williams, and Langbourne M. Williams, trading as John L. Williams & Sons, and Jno. Skelton Williams, in his individual capacity, be likewise enjoined and restrained until the further order of this court from the further prosecution of their suit aforesaid in the law and equity court of the city of Richmond in which the estate of the bankrupt company is sought to be administered.

And the clerk of this court will forthwith cause a copy of this order to be served upon each of the parties aforesaid who are enjoined by this order.

An appeal being desired from this decree to the United States circuit court of appeals for this circuit, the same is hereby allowed,

upon condition that it be taken and perfected in time to be heard on the first day of the next term of said circuit court of appeals, and upon further condition that an appeal bond with good security be executed before this court in the penalty of $200.00, as required by law.

Pending the appeal hereby allowed, the injunction aforesaid is not to interfere with the disposition by sale of the residue of the stock and assets on hand, belonging to the said George M. West Company, or collection of accounts or other debts due to it, or to the payment of the current expenses incident to said sale or collection.

EDMUND WADDILL, JR., *Judge.*

Richmond, Va., Jan'y 10th, 1899.

Whereupon the cause was taken on error to the circuit court of appeals for the fourth circuit, and having come on for argument at the February term, 1899, of the said circuit court of appeals for the fourth circuit before the undersigned, and said court desiring for its proper decision the instruction of the Supreme Court of the United States concerning a certain question or proposition of law arising in said cause—

Now, therefore, we, the undersigned, do hereby certify said
6 question or proposition of law to the Supreme Court of the United States for instruction as aforesaid.

Question. Whether or not a plea that the party against whom the petition was filed "was not insolvent as defined in the bankrupt act at the time of the filing of the petition against him" is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors.

As witness our hands this 24th day of February, 1899.

NATHAN GOFF,
U. S. Circuit Judge.
THOS. J. MORRIS,
District Judge.
WM. H. BRAWLEY,
District Judge.

Endorsed: "The clerk is directed to file and transmit certified copy to the Supreme Court. Feb. 24, 1899. Nathan Goff. Filed Feb. 24, 1899."

7 UNITED STATES OF AMERICA:

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing is a true copy of the original certificate filed and now remaining of record in the therein-entitled cause.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the United States circuit court of appeals for the fourth circuit, at Richmond, on this 27th day of February, A. D. 1899.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals.

8 [Endorsed:] Geo. M. West Co., appellant, *vs.* Lea Bros. & Co. *et al.*, appellees. Certified question of law from U. S. circuit court of appeals, fourth circuit. In bankruptcy. Attorneys — appellant, Henry & Williams, State Bank building, Richmond, Va.; attorneys for appellees, Dawson & Seaton, Shafer building, Richmond, Va.

Endorsed on cover: File No. 17,340. U. S. C. C. of appeals, 4th circuit. Term No., 755. George M. West Company, appellant, *vs.* Lea Bros. & Company *et al.* (Certificate.) Filed April 1st, 1899.

No. 755.

Brf. of Henry for Appt.

755

Filed April 29, 1899.

Office Supreme Court U. S.
FILED
APR 29 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

GEORGE M. WEST CO., Appellant,

vs.

LEA BROS. & CO., Appellees.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT.

BRIEF FOR GEORGE M. WEST COMPANY,
by W. W. HENRY, Counsel.

IN THE

Supreme Court of the United States.

GEORGE M. WEST CO., APPELLANT,

vs.

LEA BROS. & CO., APPELLEES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT.

BRIEF FOR GEORGE M. WEST COMPANY, by W. W. HENRY, Counsel.

This is a case of petitioning creditors in involuntary bankruptcy against the appellant, which had made a general deed of assignment and offered a plea of solvency.

The question submitted to this court by the Circuit Court of Appeals of the Fourth District is in the following words (top p. 5 of Record): "Whether or not a plea that the party against whom the petition was filed 'was not insolvent as defined in the bankrupt act at the term of the filing of the petition against him,' is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors."

ARGUMENT.

Under the Bankrupt Act of 1867 there was much discussion and various decisions, as to the meaning of the word "insolvency," as used in that act. The Supreme Court, in *Toof* v. *Martin*, 13 Wall., p. 47, said: "The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by Congress."

Congress, in passing the act now in force, determined to restrict the meaning of the term in all cases, to its general and popular sense, and in Section 1 (15) provided that: "A person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be removed or concealed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." And under (19) defined the word "persons" to indicate "corporations, officers, partnerships," &c. The meaning of this definition of "insolvency" seems plainly, that it requires that the assets of the alleged insolvent must be insufficient, at a fair valuation, to pay his debts, exclusive of any property he may have conveyed, &c., with intent to defraud, hinder or delay his creditors. That is, in case he has made such conveyance, the property so conveyed shall be excluded from the estimate of his assets. Any other meaning, such as was contended for in the District Court by the appellees, would restrict the use of the word "insolvent," when used in the act, to the case of a person who had made a fraudulent conveyance, and no other

person, however insufficient his assets to pay his debts, could be deemed insolvent, in contemplation of this act; which is contrary to reason, and does violence to the language of the act.

The law of 1867 (amended in 1874) recites in Sec. 39, a number of acts which, when committed, made the debtor liable to be made an involuntary bankrupt. An examination of these shows that many of them do not necessarily require insolvency; but the acts being admitted, or being found by a jury to have been committed, the debtor was adjudged a bankrupt. (See *Wilson* v. *City Bank*, 17 Wal., 473, which cites the section). By the act now in force Congress determined to change this, and in all cases of proceedings in involuntary bankruptcy to require both insolvency, and acts of bankruptcy on behalf of the debtor, to enable the petitioning creditors to succeed in throwing him into bankruptcy. Following the decision in *Buckingham* v. *McLean*, 13 How., 446, and others to the same purport, the act clearly distinguishes between insolvency and bankruptcy. The first makes it insufficiency of assets to pay debts, the second, an adjudicated status of the debtor, based on certain acts which may, or may not, involve insolvency. This is apparent from the following citation from section 3 of chapter 111 of the act:

a. "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or

(5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists of having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment.

c. "It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section, to allege and prove that the party proceeded against was not insolvent as defined in this act, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d. "Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to an examination the burden of proving his solvency shall rest upon him."

By the first sub-division marked (*a*) of this section, acts of Bankruptcy are made to consist of certain acts of the debtor,

listed under five heads. Unless some one of these has been committed, the debtor cannot be adjudicated a bankrupt, however insolvent he may be. By the second sub-division marked (*b*), the right is given to creditors to file a petition in involuntary bankruptcy against their debtor, "who is insolvent and has committed an act of bankruptcy." This clearly requires the existence of both facts to justify the adjudication of a debtor as an involuntary bankrupt. By the third sub-division marked (*c*), the right is given to the debtor to defend the petition of his creditors, by pleading and proving that, at the date of the filing of said petition, he "was not insolvent, as defined by this act," and if he proves his plea, the petition shall be dismissed. Substitute for "insolvent" in these sub-divisions its definition as fixed by the act, and our position is made clear.

The distinction between insolvency and acts of bankruptcy, is made clear, and their concurrence made necessary, also, in Chapter V of the Act of Congress, which provides, Section 18 (*d*): "If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition."

"Sec. 19. *Jury Trials*, a. A person against whom an involuntary petition has been filed, shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived."

By Sec. 30. This court is directed to prescribe the necessary rules, forms and orders as to procedure, and for carrying the act into force and effect. This has been done, and "Gen-

eral orders and forms in bankruptcy," so prescribed, are printed as Appendix to Volume 172, U. S. R.

In the form of petition by creditors (pp. 681–2) they are required to state "that said (their debtor) is insolvent, and that within four months next preceding the date of this petition, the said (their debtor) committed an act of bankruptcy, in that he did," &c. In the form for pleading by the debtor (p. 684) he denies, that "he has committed the act of bankruptcy set forth in said petition, or that he is insolvent," &c. These forms are a judicial construction by this court of the provisions of the act recited, for to frame the said forms of procedure in pleading the court of necessity must have construed the provisions of the act as to pleading.

That under the act now in force two things must concur to adjudicate an involuntary bankrupt, to wit: insolvency and committal of an act of bankruptcy, seems clear by the language of the act, and by the construction put upon it by this court in the forms of pleading prescribed by it. This being so, to answer the question presented to this court in the negative, and to hold that a debtor who has made a general assignment for the benefit of his creditors, is thereby denied the right to plead and prove his solvency, the court must find some provision of the act making such an assignment an exception to the requirement of Sec. 111, sub-division *b*, above recited, and dispensing with the element of insolvency required by that sub-division, or that such a deed necessarily implies insolvency, within the meaning of the act. There is no provision of the act making such an exception, and such a deed does not necessarily imply insolvency as defined by the act. We have seen that a person is only insolvent, as the word is used and defined by the act, when his property shall not, at a fair valuation, be sufficient in amount to pay his debts, exclusive of the property, if any, involved in an attempt to defraud creditors. No such attempt is alleged here. A debtor may become involved so as to make it best for himself and his creditors, that he should avoid litigation, and forced sales under threatened judgments,

and priorities, by making a general assignment for the benefit of all creditors, and yet have property more than sufficient to pay his creditors at a fair valuation.

Such cases, though rare, are in the experience doubtless of the court, and the possibility of solvency is provided for in the deed in question, by the provision, that after the payment of creditors and expenses out of assets, "the balance, if any, to be paid to the party of the first part (the grantor) or its assigns."

It will be seen, also, that to hold that the making of a general assignment for the benefit of all creditors, is conclusive evidence of insolvency, within the meaning of that word as used in the act, is to amend and enlarge the definition of the word as fixed by the act.

The act limits the meaning of the word to the condition of a debtor whose property is insufficient, at a fair valuation, to pay his debts. The contention of the appellees would require the addition of the words, "or the making of a general assignment for the benefit of creditors."

Let us examine now the grounds taken by the appellees.

In order to sustain their position the learned counsel for the appellees limit the right to plead insolvency to subdivisions *b* and *c*., chap. 111, and construe these subdivisions to refer merely to the first three acts of bankruptcy, designated in subdivision (*a*), under the numerals (1), (2) and (3), and exclude the right of defense, on the ground of solvency, from the acts designated under the numerals (4) and (5). In order to reach this conclusion they make the word "subdivision," refer to the parts of the section indicated by numerals, and not to those indicated by letters. This, we contend, is plainly error. The sections are divisions of the chapters of the Act, and the several paragraphs into which the sections are divided are subdivisions of those sections. That such was the meaning of the act is seen by comparing the different parts of this section. If the numerals were referred to as marking the subdivisions of the section, they would be numbered continuously through the section, and yet we find these numerals reaching (5) in

subdivision (*a*), and commencing again with (1) in subdivision (*b*). The same arrangement of the numerals appear in subdivisions of other sections; for example, in sec. 39, where (*a*) has 9 numerals, and (*b*) has from (1) to (3). Again, the words of subdivision (*b*) apply to all acts of bankruptcy, and require insolvency to concur with any and every one of them. "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy." No distinction is made in the acts of bankruptcy.

That the letters by which the section is subdivided are to be taken as representing the numbers of the subdivisions is plain from the language of subdivision (*c*). "It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section," &c. When we look to the subdivision indicated by (*a*), which is the first, we find that the acts of bankruptcy indicated, and divided by the numerals, stand in different relations to insolvency as an essential to the mere act of bankruptcy. (1) makes an attempt to defraud creditors an act of bankruptcy, without insolvency, and so does (4) regarding the general assignment for the benefit of creditors. The preference given, or allowed to be gotten, in favor of some of his creditors, recited in (2) and (3), is not an act of bankruptcy, unless the debtor was at the time insolvent. As against all of these, we contend, the act allows a defense of solvency. As to (5), that makes a case of confessed insolvency and a waiver of defense, or a case of mistake of the debtor as to his condition when he made confession. Why should Congress allow this privilege of pleading solvency to the debtor who has defrauded his creditors, and deny it to the honest debtor, who gave a preference, believing himself solvent? This would be offering a premium for actual fraud, which is plainly distinguished from technical fraud by the act. That this is error in the construction is made plainer by sub-division (*d*), which provides for the production of the debtor's books, papers and accounts, on the trial of his plea of solvency; "whenever a person against whom a petition has been filed, as hereinbefore provided under the

second and third subdivisions of this section, takes issue with and denies the allegation of his insolvency." The second subdivision, marked (*b*), alone gives the right to file the petition treated of, and the third subdivision, marked (*c*), gives the right to plead solvency to said petition. Subdivision (*a*) gives no right to file a petition or to plead; it is plain, therefore, that no part of (*a*) is alluded to. It is also plain that the debtor should be liable to examination upon his books, &c., on every plea of solvency, and no reason can be conceived why any distinction should be made as to this between the cases in which he so pleads. Yet the learned counsel, by their construction, make the act require the production of books and papers, when the debtor has given, or allowed, a preference, but does not require such production when he plays the rascal, and attempts to defraud his creditors. Such could not be the meaning of the act. To construe the subdivisions of section 3 as indicated by letters, commencing with (*a*), and afterwards referred to as first, second and third subdivisions, makes the section intelligible and harmonious in its parts, and with the sections in chapter IV quoted, regulating pleadings generally.

Justice Brown, *in re Gutwillig*, 475 Fed. Rep., January, 1899, takes this view of the enumeration of the subdivisions of the chapters by letters, making (*a*) as (1)st, (*b*) as (2)nd, and so forth.

The learned counsel for the appellees have argued in the lower courts, that this treatment of the subdivisions of Chapter III in their enumeration would produce inconsistency, in that by the acts of bankruptcy numbered (2) and (3), section 3, the insolvency required must be cotemporaneous with the preference given or allowed by the debtor, while by subdivision (*c*) of section 3, the plea is solvency at the time of filing the petition against him. But these are not irreconcilable. A debtor may have been insolvent when he gave or allowed a preference, and have become solvent when the petition is filed; for the filing is allowed within four months after the recording or registering of the instrument by which the preference is given,

or allowed, and such record or registering may be delayed for an indefinite time.

It seems, therefore, that it is the intention of the act to provide by subdivisions (*c*) and (*d*) of Chapter III, special defenses and procedures for solvent debtors, but not to conflict with the general provisions for defenses contained in Chapter IV. The court will always construe an act so as to make it harmonious, if possible, and will not take away the privileges of debtors, under Chapter IV, unless in direct conflict with some other provision of the act.

In the case of *in re Gutwillig* (*supra*) the plea of solvency was not interposed, and the question here was not, therefore, involved.

Justice Brown held *in re Gutwillig* (*supra*), that a trustee appointed for a debtor declared a bankrupt, under the present act, had a right to have annulled a general assignment made by the bankrupt within four months before the filing of the petition of creditors; on the ground that the administration of the assets under such assignment, interfered materially with the administration intended by Congress in the act. And for that reason the assignment must be considered a fraud upon the act. But his decision was based altogether upon the rights of the trustee after the adjudication in bankruptcy, and in no way relates to the right of the debtor to defend the petition.

Respectfully submitted,

W. W. HENRY,

Counsel for Geo. M. West Co.

IN THE

Supreme Court of the United States.

GEORGE M. WEST COMPANY, APPELLANT,

versus

LEA BROS. & CO. ET ALS., APPELLEES.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR LEA BROS. & CO. ET ALS.

EMMETT SEATON, Counsel.

The question certified to this court by the Circuit Court of Appeals for the Fourth Circuit is as follows:

Whether or not a plea that the party against whom a petition in bankruptcy had been filed "was not insolvent as defined in the bankrupt act at the time of the filing of the petition against him" is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors?

Argument.

This question arises under section 3 of the bankrupt law as recently enacted by Congress, and its determination depends upon the construction to be given to that section.

Section 3 of the act is as follows:

"(a) Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

"(b) A petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

"(c) It shall be a complete defense to any proceedings in bankruptcy, instituted under the first subdivision of this section, to allege and prove that the party proceeded against was not insolvent, as defined in this act, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be

dismissed, and, under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt.

"(d) Whenever a person against whom a petiton has been filed, as hereinbefore provided under the second and third subdivisions of this section, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to examination, and give testimony as to all matters tending to establish solvency or insolvency, and, in case of his failure to so attend and submit to examination, the burden of proving his solvency shall rest upon him.

"(e) Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

"If such petition be dismissed by the court, or withdrawn by the petitioner, the respondent, or respondents, shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bonds."

Appellees in this case contend that a plea of solvency, as defined by the bankrupt act, at the time of the filing of a petition in bankruptcy, is not a valid plea in bar to a petition, filed against a debtor who has made a general deed of assignment for the benefit of his creditors, and in support of that contention they give the following construction to section 3 of the act:

1. That paragraph (a) of said section 3, prescribes the several acts of bankruptcy.

2. That paragraph (b) of said section 3, prescribes the time within which a petition in bankruptcy must be filed.

3. That paragraph (c), of said section 3, prescribes a defence to act of bankruptcy enumerated (1) in paragraph (a) of said section 3, and to no other; and makes it encumbent upon the bankrupt when a petition is filed on that ground to prove his solvency.

3. That paragraph (d) relates to the second and third acts of bankruptcy enumeratrd (2) and (3) in paragraph (a), and requires the bankrupt, when issue in those cases is taken on the question of solvency, to appear in court with his books papers and accounts, and submit to an examination; but does not place upon him the burden of proving his solvency.

4. That no provision whatever is made for the defence of solvency to the acts of bankruptcy enumerated (4) and (5) in said paragrape (a), and supposing the court in all other respects to have proper jurisdiction, there can be none.

The appellant contends that the use of the laguage "*first subdivision*" in paragraph (c) should be construed as applying to and embracing the entire paragraph marked (a), and that the subdivisions of section 3 are *a, b, c, d and e*. They may for some purposes be so considered, but they cannot for the purpose of the appellant in this case; as it would destroy the force and effect of the entire section. While the language "*first subdivision*," as used in the first part of the paragraph, might give some little color to the position taken by the appellant, yet the following language contained at the end of said paragraph obviates any question or doubt as to its true intent and purpose: 'And under *said subdivision one*, the burden of proving solvency shall be on the alleged bankrupt.

From that it is clearly seen that the language *said subdivision one*, is meant to correspond with and embrace the language, *first subdivision* at the beginning of the paragraph; each meaning the same thing.

Putting aside, however, the language of the act, when we apply the provisions of paragraph (c) to either of the acts of bankruptcy enumerated (2) and (3), we find that it has no application whatever, because it raises an issue of solvency as at the time of the filing of the petition in bankruptcy; while the question of solvency under the acts of bankruptcy (2) and (3) would be as at the time of the commission of the act. It is necessary in those two cases that insolvency should exist at the time the act is committed, and, therefore, the question of solvency can be put in issue as readily as can be the commission of the act of bankruptcy itself. By the language of the law it is one of its ingredients. Such is not the case when it is applied to the first act of bankruptcy enumerated (1), as the issue of solvency as at the time of the filing of the petition would not be in conflict with its terms as set forth in the bankrupt act.

If the contention of the appellant is to be sustained, then it is impossible to give any sensible construction to paragraph (d), as (d) would have to be considered as embracing (b) and (c), which cannot be possible. The appellees construe paragraph (d) to relate to acts of bankruptcy numbered (2) and (3), and prescribe what shall be the duty of the alleged bankrupt when in such cases he denies the allegation of his insolvency.

The learned counsel for the appellant contends, that if this construction of paragraph (d) were adopted, that a debtor against whom a petition in bankruptcy had been filed, for having given or allowed a preference, would be forced to produce his books, papers and accounts in court and submit to an examination, while one who had attempted to defraud his creditors, by a fraudulent conveyance, would not be subjected to such an examination or re-

quired to so produce his books, papers and accounts. Such, however, is not the case, but, to the contrary, the position taken by appellant clearly demonstrates that paragraph (d) cannot be construed as embracing paragraphs (b) and (c), for if it does, then it would simply be incumbent upon the bankrupt, who had tried to defraud his creditors by a fraudulent conveyance, to produce his books, papers and accounts in court and submit to an examination. That cannot be, for the reason that paragraph (c) puts upon such bankrupt the burden of proving his solvency; the onus is upon him, and it is not a mere matter of submitting to an examination, he must prove his solvency. If, according to appellant's contention, paragraph (d) embraces both (b) and (c), and (c) refers to and includes each of the acts of bankruptcy enumerated in paragraph (a), then, under paragraph (c), the burden of proving solvency is made encumbent upon every bankrupt against whom a petition in bankruptcy is filed; while, according to the same contention, we find that, under paraghaph (d), the most that could be required of any bankrupt would be to appear in court with his books, papers and accounts and submit to an examination, and in no case could he be made to prove his solvency. Then, in order to properly enforce the bankrupt law, one or the other of these paragraphs must be stricken out, for they are according to that contention, inconsistent.

Another contention of the appellant is that paragraph (b) gives the right to file the petition; paragraph (c) prescribes a defense to such petition; that (d) in no wise refers to (a), and, therefore, it can embrace the two without inconsistency. But are they not still conflicting as to the one upon whom the burden of proof shall be?

The language used in paragraph (c) is as follows: "It shall be a complete defense to any proceeding in bankruptcy, instituted under the *first subdivision* of this section (which appellant construes to mean paragraph (a)), to allege and prove that the party proceeded against was not

insolvent, &c." Appellant says that it is pursuance of paragraph (b) that a bankruptcy proceeding is instituted, yet it in no wise contends that the language in paragraph (c) is in that respect meaningless.

The appellant also says that there is no reason why a plea of solvency, as at the time of the filing of a petition in bankruptcy, should not be allowed to the acts of bankruptcy numbered (2) and (3); because the bankrupt might within four months have regained his solvency. Appellees respectfully submit that such a contention is not a practical one. In the first place, the law does not contemplate that he will regain his solvency within that time. That is the time allowed for the filing of the petition, and not one within which it is supposed he might rebuild his financial condition. If such a plea were allowed, would it not then be encumbent upon the petitioning creditors, who would be endeavoring to catch a rascal, to establish insolvency at the time of the commission of the act, and also at the time of the filing of the petition in bankruptcy?

It would certainly be in the power of the bankrupt to force them to do so. It is not the policy of the law to impose any such undue burden upon the petitioners. Let us see what hardship it would be upon the bankrupt in such case. Has he not by such an act branded himself as a dishonest man? Has he not tried, either by giving or knowingly permitting a preference to one or more creditors, to perpetrate a fraud upon the others? Has he not violated the trust that the bankrupt act has imposed upon him? An insolvent debtor is but a trustee for the benefit of his creditors, and if he acts dishonestly, while he occupies that relation to his creditors, would it be a severe punishment to him to be declared a bankrupt, even though he had accidentally become solvent within the period allowed for the filing of the petition? Had he acted honestly towards his creditors, when in an insolvent condition, then no bankruptcy proceeding could have been instituted against him. Why

should he be entitled to plead solvency at the time of the filing of the petition, and it be insufficient for the petitioners to show insolvency at that time? If he be not proven insolvent, at the time of the commission of the act, the creditors cannot question his after condition for the purpose of having him adjudged a bankrupt. Would he not be given a double advantage over the petitioners?

Appellant, in support of its position, refers to and quotes from sections 18 and 19 of the act as follows:

"Sec. 18. (a) If the bankrupt, or any of his creditors, shall appear within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition."

"Sec. 19. (a). Jury Trials. A person against whom an involuntary petition has been filed, shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived."

In answer to this, appellees say, that if in any case it is immaterial to allege insolvency in the petition, then in such case, the above sections have no bearing whatever on the question at issue. Appellant admits that in case of the commission of the fifth act of bankruptcy, that is where the debtor acknowledges, in writing, his inability to pay his debts and expresses a willingness to be adjudged a bankrupt, that by his own act, he has confessed his insolvency, and is, therefore, denied the right of setting up solvency as a defence. Surely, then, in that case the allegation of insolvency is an immaterial one. If so, in that case, why should it not be also when the debtor has made

a general deed of assignment? In substance, the two acts are but the same. There is in each case an acknowledgement by the debtor of his inability to pay his debts, and the act, in either case, certainly places him in such a position, that it is impossible to ascertain whether he is solvent or insolvent, save by a winding up of his estate.

If it had been intended by the law to allow the plea of solvency to one who had made a general deed of assignment for the benefit of his creditors, can any reason be assigned why it did not, as in case of acts of bankruptcy numbered (2) and (3), make insolvency at the time of the execution of the deed, an ingredient of the act? If one has given up all of his property, as the deed in this case recites, then the question of solvency ought properly be one, as at the time of the execution of the deed. Why would not the law also have made some provision, as to the one upon whom the burden of proving solvency should rest, or for the production of debtor's books, accounts and papers? It made such a provision for acts of bankruptcy numbered (1), (2) and (3).

Appellant also says that it would be offering a great premium for fraud if insolvency, at the time of the filing of the petition, were allowed as a plea to one who had committed the first act of bankruptcy and denied to an honest debtor who had surrendered his property for the payment of his debts. Surely that is an anomalous position. Can a creditor question the act of his debtor, so long as that debtor is solvent and has enough assets out of which the creditor can enforce the payment of his debt? Why, then, should not a debtor, against whom a petition in bankruptcy has been filed for having committed the first act of bankruptcy, be allowed to come in and prove his solvency at the time the petition is filed, or, as it were, the allegation made? If he is successful and establishes solvency, he has been guilty of nothing wrong or fraudulent, even though he may have given away a vast portion of his

property; because the creditor still has an ample recourse at law, by which he can enforce the payment of his obligation.

No provision having been made for the defense of solvency as to the last two acts of bankruptcy numbered (4) and (5), the law conclusively presumes, from the debtor's own act, that he is insolvent, and he is prohibited from gainsaying or denying it. Such a view is not so unreasonable as the appellant may suppose, as the very object of the bankrupt law is to give to the creditors, as far as possible, control over the estate of one whose assets are to be administered for the payment of his debts.

The effect of the passage of a bankrupt law by Congress is to supersede all State insolvent laws, from the time of its taking effect; and so far as a State law attempts to administer on the effects of an insolvent debtor and distribute them among his creditors, it is to all intents and purposes an insolvent law.

Bump on Bankruptcy, pages 98 and 99.

Thornhill v. *Bank of Louisiana*, Federal Cases, No. 13,991; *in re Merchants' Insurance Co.*, F. C. 9,441; *in re Independent Insurance Co.*, F. C. 7,017.

Platt v. *Archer*, F. C. 11,213.

Shyrock v. *Bashore*, F. C. 12,820.

It is also to be seen from the definition of insolvency as contained in the act, that the law does not contemplate a plea of solvency in a case of this character. The definition of insolvency under the existing law is as follows:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transfered, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

A general deed of assignment, though made by a sol-

vent person, for the benefit of his creditors, with or without preferences, is fraudulent and void, as the necessary consequence of it is to delay and defraud creditors, by preventing them from subjecting his property, by the ordinary process of law, to the satisfaction of their claims, and the effect of one's act is presumed to have been his intent.

Bump on Bankruptcy, page 239, and *seq.*; *in re Randall*, Federal Cases, No. 11,551; *in re Smith*, Federal Cases, No. 12,974.

It would be necessary, in order that this appellant might sustain its plea of solvency, for it to prove that it has assets, other than what was conveyed by its deed, sufficient to pay its debts, so that its creditors would not be delayed from recovering the amounts due them by process of law. Inasmuch, however, as the deed of assignment executed by it conveys all of its assets, it would be impossible for it to prove that it was not insolvent, as defined by the bankrupt act, at the time of the filing of the petition in bankruptcy.

There can be no question that the fourth act of bankruptcy was included in the present bankrupt statutes for the reason that it has heretofore been so often decided, under all other bankrupt statutes that have ever been in force in this country, that such an act on the part of a debtor is not in keeping with the policy of a bankrupt law. The same reasons for such decisions as existed under former bankrupt statutes exist now.

A deed of assignment is wholly contrary to the policy of a bankrupt law, it divests the bankrupt courts of its jurisdiction and deprives the creditors of the rights given them by the act.

Black on Bankruptcy, p. 20 and *seq.*

In re Gutwillig, p. 475 Federal Reporter, January, 1899.

Boese v. *King*, 108 U. S., 379; *in re Burt*, Federal Cases, No. 2,210.

Cragin v. *Thompson*, Federal Cases, No. 3,320 ; *in re Beisenthal*, Federal Cases, No. 1,236 ; *in re Frisbee*, Federal Cases, No. 5,129 ; *in re Croft*, Federal Cases, No. 3,404 ; *in re Smith*, Federal Cases, No. 12,974.

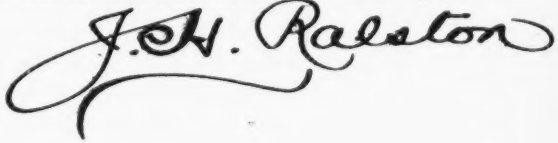
Appellees insist that under the present bankrupt act, the plea of solvency to a petition in bankruptcy is a valid plea in bar to such petition only in such cases where insolvency is an ingredient of the act, or when it is allowed as a plea by the law, which is not so in case of the execution of a general deed of assignment. The definition of a *petition* as given in section (1) of the act is as follows (20) : "Petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor, praying for the benefits of this act or *by creditors alleging the commission of an act of bankruptcy by a debtor therein named.*"

Appellees contend that the construction asked for by them is the only reasonable one that can be given, and is the proper construction in order that the object for which the bankrupt law was enacted may be accomplished, and respectfully submit that the decision of the District Court in this case was a right and proper one.

Respectfully submitted.

EMMETT SEATON,

Counsel for Lea Bros. & Co. et. als., Appellees.



WEST COMPANY *v.* LEA.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 755. Submitted May 1, 1899.—Decided May 22, 1899.

As a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defence to a petition based upon the making of a deed of general assignment is not warranted by the bankruptcy law.

THE statement of the case will be found in the opinion of the court.

Mr. W. W. Henry for appellant.

Mr. Emmett Seaton and *Mr. J. H. Ralston* for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

The facts stated in the certificate of the Circuit Court of Appeals are substantially as follows:

Lea Brothers & Company and two other firms filed, on December 18, 1898, a petition in the District Court of the United States for the Eastern District of Virginia, praying that an alleged debtor, the George M. West Company, a corporation located in Richmond, Virginia, be adjudicated a bankrupt, because of the fact that it had, on the date of the filing of the petition, executed a deed of general assignment, conveying all its property and assets to Joseph V. Bidgood, trustee. The George M. West Company pleaded denying that at the time of the filing of said petition against it the corporation was insolvent, within the meaning of the bankrupt act, and averring that its property at a fair valuation was more than sufficient in amount to pay its debts. The prayer was that the petition be dismissed. The court rejected this plea, and adjudicated the West Company to be a bankrupt. The cause was referred to a referee in bankruptcy, and certain creditors secured in the deed of assignment, who had instituted proceedings in the law and equity court of the city of Richmond, under which that court had taken charge of the administration of the estate and trust under the deed of assignment, were enjoined from further prosecuting their proceedings, in the state court, under said deed of assignment. From this decree an appeal was allowed to the Circuit Court of Appeals for the Fourth Circuit. On the hearing of said appeal the court, desiring instructions, certified the case to this court. The certificate recites the facts as above stated, and submits the following question:

"Whether or not a plea that the party against whom the petition was filed 'was not insolvent as defined in the bankrupt act at the time of the filing of the petition against him' is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors."

The contentions of the parties are as follows: On behalf of the debtor it is argued that under the bankrupt act of 1898 two things must concur to authorize an adjudication of involuntary bankruptcy, first, insolvency in fact, and, second, the commission of an act of bankruptcy. From this proposition the conclusion is deduced that a debtor against whom a proceeding in involuntary bankruptcy is commenced is entitled entirely irrespective of the particular act of bankruptcy alleged to have been committed, to tender, as a complete bar to the action, an issue of fact as to the existence of actual insolvency at the time when the petition for adjudication in involuntary bankruptcy was filed. On the other hand, for the creditors it is argued that whilst solvency is a bar to proceedings in bankruptcy predicated upon certain acts done by a debtor, that as to other acts of bankruptcy, among which is included a general assignment for the benefit of creditors, solvency at the time of the filing of a petition for adjudication is not a bar, because the bankrupt act provides that such deed of general assignment shall, of itself alone, be adequate cause for an adjudication in involuntary bankruptcy, without reference to whether the debtor by whom the deed of general assignment was made was in fact solvent or insolvent.

A decision of these conflicting contentions involves a construction of section 3 of the act of July 1, 1898, c. 541, 30 Stat. 546. The full text of the section in question is printed in the margin.[1]

[1] SEC. 3. Acts of Bankruptcy. — *a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

It will be observed that the section is divided into several paragraphs, denominated as *a*, *b*, *c*, *d* and *e*. Paragraph *a* is as follows:

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(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. A petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c. It shall be a complete defence to any proceedings in bankruptcy, instituted under the first subdivision of this section, to allege and prove that the party proceeded against was not insolvent, as defined in this act, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed, and, under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt.

d. Whenever a person against whom a petition has been filed, as hereinbefore provided under the second and third subdivisions of this section, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers and accounts, and submit to examination, and give testimony as to all matters tending to establish solvency or insolvency, and, in case of his failure to so attend and submit to examination, the burden of proving his solvency shall rest upon him.

e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representative, all costs, expenses

"SEC. 3. Acts of Bankruptcy. — *a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It is patent on the face of this paragraph that it is divided into five different headings, which are designated numerically from 1 to 5. Now, the acts of bankruptcy embraced in divisions numbered 2 and 3 clearly contemplate not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary, as to the acts embraced in enumerations 1, 4 and 5, there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph *a*, it results that the non-existence of insolvency, at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in 1, 4 or 5 (which embrace the making of a deed of general assignment) does not constitute a defence to the petition, unless provision to that effect be elsewhere found in the statute. This last consideration we shall hereafter notice.

The result arising from considering the paragraph in ques-

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and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court, or withdrawn by the petitioner, the respondent, or respondents, shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court, and paid by the obligors in such bonds.

tion would not be different if it be granted *arguendo* that the text is ambiguous. For then the cardinal rule requiring that we look beneath the text for the purpose of ascertaining and enforcing the intent of the lawmaker would govern. Applying this rule to the enumerations contained in paragraph *a*, it follows that the making of a deed of general assignment, referred to in enumeration 4, constitutes in itself an act of bankruptcy, which *per se* authorizes an adjudication of involuntary bankruptcy entirely irrespective of insolvency. This is clearly demonstrated from considering the present law in the light afforded by previous legislation on the subject.

Under the English bankruptcy statutes (as well that of 1869 as those upon which our earlier acts were modelled), and our own bankruptcy statutes down to and including the act of 1867, the making of a deed of general assignment was deemed to be repugnant to the policy of the bankruptcy laws, and, as a necessary consequence, constituted an act of bankruptcy *per se*. This is shown by an examination of the decisions bearing upon the point, both English and American. In *Globe Insurance Co.* v. *Cleveland Insurance Co.*, 14 N. B. R. 311; 10 Fed. Cas. 488, the subject was ably reviewed and the authorities are there copiously collected. The decision in that case was expressly relied upon in *In re Beisenthal*, 14 Blatchford, 146, where it was held, that a voluntary assignment, without preferences, valid under the laws of the State of New York, was void as against an assignee in bankruptcy, and this latter case was approvingly referred to in *Reed* v. *McIntyre*, 98 U. S. 513. So, also, in *Boese* v. *King*, 108 U. S. 379, 385, it was held, citing (p. 387) *Reed* v. *McIntyre*, that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the bankrupt act, such a deed was repugnant to the object of a bankruptcy statute, and therefore was in and of itself alone an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the bankrupt act of 1867, March 2, 1867, c. 176, 14 Stat. 536, or the amendments thereto of June 22, 1874, c. 390, and July 26, 1876, c. 234, 18 Stat. 180; 19 Stat. 102. Neither, how-

ever, the act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result, of the clause, in the act of 1867, forbidding assignments with "intent to delay, defraud or hinder" creditors and from the provision avoiding certain acts done to delay, defeat or hinder the execution of the act. (Rev. Stat. 5021, par. 4, 7.) Now, when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous rule, by an express statement, in the present statute have been lucidly expounded by Addison Brown, J. *In re Gutwillig*, 90 Fed. Rep. 475, 478.

But it is argued that whatever may have been the rule in previous bankruptcy statutes, the present act, in other than the particular provision just considered, manifests a clear intention to depart from the previous rule, and hence makes insolvency an essential prerequisite in every case. To maintain this proposition reliance is placed upon paragraph *c* of section 3, which reads as follows:

"*c*. It shall be a complete defence to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and, under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt."

The argument is that the words "under the first subdivision of this section" refer to all the provisions of paragraph *a*, because that paragraph, as a whole, is the first part of the section, separately divided, and although designated by

the letter *a*, it is nevertheless to be considered, as a whole, as subdivision 1. But whether the words "first subdivision of this section," if considered intrinsically and apart from the context of the act, would be held to refer to paragraph *a* as an entirety or only to the first subdivision of that paragraph, need not be considered. We are concerned only with the meaning of the words as used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph *a*. Thus, in the last sentence of paragraph *c* the matter intended to be referred to by the words "first subdivision of this section," used in the prior sentences, is additionally designated as follows: "and under said subdivision one," etc., language which cannot possibly be in reason construed as referring to the whole of paragraph *a*, but only to subdivision 1 thereof.

This is besides more abundantly shown by paragraph *d*, which provides as follows:

"*d*. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegations of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers and accounts and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."

This manifestly only refers to enumerations 2 and 3 found in paragraph *a*, which, it will be remembered, make it essential that the acts of bankruptcy recited should have been committed by the debtor while insolvent. Indeed, if the contention advanced were followed, it would render section 3 in many respects meaningless. Thus, if it were to be held that the words "first subdivision of this section," used in paragraph *c*, referred to the first division of the section — that is, to paragraph *a* as a whole — it would follow that the words "second and third subdivisions of this section," used in paragraph *d*, would relate to the second and third divisions of

the section — that is, to paragraphs *b* and *c*. But there is nothing in these latter paragraphs to which the reference in paragraph *d* could possibly apply, and therefore, under the construction asserted, paragraph *d* would have no significance whatever. To adopt the reasoning referred to would compel to a further untenable conclusion. If the reference in paragraph *c* to the "first subdivision of this section" relates to paragraph *a* in its entirety, then all the provisions in paragraph *a* would be governed by the rule laid down in paragraph *c*. The rule, however, laid down in that paragraph would be then in irreconcilable conflict with the provisions of paragraph *d*, and it would be impossible to construe the statute harmoniously without eliminating some of its provisions.

Despite the plain meaning of the statute as shown by the foregoing considerations, it is urged that the following provision contained in paragraph *b* of section 3 operates to render any and all acts of bankruptcy insufficient, as the basis for proceedings in involuntary bankruptcy, unless it be proven that at the time the petition was filed the alleged bankrupt was insolvent. The provision is as follows: "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." Necessarily if this claim is sound, the burden in all cases would be upon the petitioning creditors to allege and prove such insolvency. The contention, however, is clearly rebutted by the terms of paragraph *c*, which provides as to one of the classes of acts of bankruptcy, enumerated in paragraph *a*, that the burden should be on the debtor to allege and prove his solvency. So, also, paragraph *d*, conforming in this respect to the requirements of paragraph *a*, contemplates an issue as to the second and third classes of acts of bankruptcy, merely with respect to the insolvency of the debtor *at the time of the commission of the act of bankruptcy*. Further, a petition in a proceeding in involuntary bankruptcy is defined in section 1 of the act of 1898, enumeration 20, to mean "A paper filed . . . by creditors *alleging the commission of an act of bankruptcy* by a debtor therein named."

It follows that the mere statement in the statute, by way of recital, that a petition may be filed "against a person who is insolvent and who has committed an act of bankruptcy," was not designed to superadd a further requirement to those contained in paragraph *a* of section 3, as to what should constitute acts of bankruptcy. This reasoning also answers the argument based on the fact that the rules in bankruptcy promulgated by this court provide in general terms for an allegation of insolvency in the petition and a denial of such allegation in the answer. These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on, in a given case, conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or if made need not be traversed.

Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defence to a petition based upon the making of a deed of general assignment, is not warranted by the bankruptcy law; and, therefore, that the question certified must be answered in the negative; and it is so ordered.